



DEPARTMENT OF JUSTICE

ROUNDTABLE CONFERENCE WITH ENFORCEMENT OFFICIALS

Remarks by

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Thank you, Kevin Grady. It is a real privilege to address this unique antitrust audience at the ABA Antitrust Section's Annual Spring Meeting. On behalf of the Antitrust Division, let me express my gratitude for a very positive working relationship between our two organizations during your tenure as Section Chair.

The press of other business kept me from attending most of the terrific panels and presentations you have enjoyed during the past two days. In the interest of efficiency, I tried to attend the one panel that seemed to me to sum it all up – Wednesday afternoon's "scholar's showcase" – which asked whether there is really any basis for believing that the benefits of antitrust enforcement exceed the costs. It will not surprise you to hear that I came away from the panel continuing to believe without hesitation that the answer is a resounding "yes."

If nothing else, it seems to me that George Priest's observation – that in the American system, active antitrust enforcement can alleviate the urge to regulate – makes this answer a slam dunk. Likewise, the panelists gave a pretty good indication that while the empirical documentation is not what it could be, cartel enforcement alone provides enormous net benefits to the world economy. As to mergers and other civil enforcement, the panelists seemed more at odds.

The program confirmed my strong belief that those of us who work in the field of antitrust enforcement should be proud of what we are doing to protect consumers and work for the better functioning of our market economy. This is not to say, however, that we can ignore the charge that we can and should do a better job of making the empirical case for what we do. Tim Muris at the Trade Commission has showed good leadership in this as in so many areas, and I think we should all pay attention to the importance of this effort.

But for me the overall value of our work is plain. So too is the correctness of the traditional enforcement hierarchy we are pursuing at the Division. First, we emphasize the fight against illegal cartels – what the Supreme Court this year in *Trinko* called the “supreme evil” of antitrust. Second, seeking to use the best and most up to date analytical tools, we call balls and strikes with respect to the mergers that come before us, and then back up our decisions in court. Finally, we have continued our emphasis on sound and objective standards in civil non-merger enforcement.

This morning I would like to spend just a few minutes touching briefly on some highlights of the past year’s work in each of these areas.

As always I will start with leadership personnel at the Division. As you know, Principal Deputy Debbie Majoras departed the Division in December. It would be impossible – because of her tremendous ability and dedication – to replace Debbie. I am, however, very happy to say that Tom Barnett of Covington & Burling will come on board soon to take the civil deputy slot that Debbie earlier held. Also, I am excited to say that David Higbee will be coming back to DOJ from his assignment as Special Assistant to the President to take the slot of Chief of Staff and Deputy AAG, to work with me in a variety of ways to make the Division’s work more efficient and effective.

As I have suggested, our criminal enforcement program is busy. At just about the halfway point of fiscal 2004, we have brought 27 criminal cases, compared with 41 total cases for all of FY03 and 33 for FY02. And the pipeline of cases and investigations is well filled. We remain at or near record numbers for grand juries open in both domestic and international cases. A good number of these cases involve very significant cartel activity. To take just one example,

the recent *Crompton* plea involved a \$50 million fine for participation in an international rubber chemicals cartel. This is merely the first case to come forward from an investigation that is likely to lead to others.

We continue to focus on our established amnesty program as the best method of detection, and on prison sentences as the most powerful component of deterrence in cartel enforcement. This explains in part the importance to the Division of the upcoming Supreme Court argument in *Empagran*, where in our judgment an untenable reading of the Foreign Trade Antitrust Improvements Act threatens to weaken our enforcement efforts by over-weighting private enforcement interests in wholly foreign cases at the expense of Government detection and enforcement. Of course, while we believe our current system is working well and are anxious not to see it weakened, we do not deny that there could be room to make enforcement even more effective. So we will watch with interest pending legislation in the fields of criminal penalties and civil de-trebling for cooperative amnesty applicants.

On the merger enforcement front, we have continued to see a significant uptick in activity, albeit not an overwhelming one. As we approach the halfway point of FY2004, we've thus far seen 648 HSR transactions (1,273 filings), compared to 1,014 transactions in all of FY03 and 1,187 in FY02. So the clear trend is in favor of at least modest growth. Obviously, the biggest merger concern on our plate right now is *Oracle/PeopleSoft*. I will avoid the temptation to argue our case, and simply say that we very much look forward to our June 7 trial date, and the opportunity to show the district court the evidence that caused us to believe this merger would be harmful to competition.

In other significant cases, our challenge to the *First Data/Concord* merger settled on the eve of trial on the same terms that the Division would have sought if successful at trial. In the *News Corp./Hughes Electronics* (“*DirecTV*”) matter we concluded, following an extensive analysis, that any competitive concerns with the merger would be addressed by the FCC’s imposition of restrictions on News Corp.’s ability to withhold programming from DirecTV’s cable and satellite competitors. In our *UPM* paper labelstock case, we saw concrete results from the effort begun by Charles James to reinvigorate coordinated effects analysis. In another coordinated effects case – one challenging a non-reportable, consummated merger in the dairy industry – the Division looks forward to a September trial date in our *DFA/Southern Belle* case. On the merger policy front, we and the Trade Commission jointly released data on merger enforcement and undertook an important workshop this past February that I am sure we will discuss during the Roundtable.

On the civil non-merger front, we of course continue to put significant efforts into assuring compliance with our Microsoft consent decree. We have named Patty Brink here in Washington and Paula Blizzard in San Francisco as special counsel to keep focus on that matter following Debbie’s departure. In the *Dentsply* case, we were disappointed not to have prevailed in the district court, but will be pursuing an appeal on our Section 2 claim. With respect to Section 2, the Division’s efforts to promote sounder and more objective analysis bore substantial fruit in the Supreme Court’s *Trinko* case. Procedurally, we are putting in place an internal system that uses specialty software to get our civil non-merger matters on a faster track toward either enforcement or closing.

On a broader level, I think it is interesting to look at the state of competition in the specific industries on which some of our regulatory sections focus, both in merger enforcement and otherwise. In commercial aviation, for example, it seems that not a day passes without an article discussing the highly competitive nature of the airline industry and the growing role of low-cost carriers. In telecommunications, the Section 271 process has been completed, signaling the openness to local competition. Exciting new and independent avenues of competition in the form of Voice Over IP and growing wireless substitution continue. The long-expected move toward consolidation in the wireless sector may actually be arriving, and other new combinations and competitive approaches may be on the horizon. We will examine each of these as they come with an eye to the many changes occurring in this dynamic sector.

With respect to policy and process, we continue to work with the FTC toward reports from the joint hearings on Intellectual Property and Antitrust and Health Care. The Division just last month held a well-attended one-day program on loyalty rebates, fidelity discounts, exclusive dealing, and other similar issues that are a topic of current discussion in the bar. We have continued to work on improving transparency, and in December – with valuable assistance from Gina Talamona in the DOJ Office of Public Affairs – the Division issued public guidelines for the “Issuance of Public Statements Upon Closing of Investigations.” Under these guidelines we have issued closing statements in several investigations and expect to continue to do so.

On the international front, support for ICN continues to be a priority, and we will have a strong contingent at ICN’s third annual meeting in Seoul next month. Kevin Grady deserves thanks and recognition for his efforts to have the Antitrust Section provide valuable support to ICN. Makan Delrahim from the Division continues to chair the Merger Working Group, which

recently concluded work on four additional Recommended Practices that will be submitted to the conference for approval. The Division will also remain active in the OECD, where I am serving as chair of the Enforcement and Cooperation Working Group, known as “Working Party 3,” which focuses on convergence in cartel and merger enforcement.

With respect to international issues, you may wonder if I will have anything to say about the EC’s recently announced decision in Microsoft. The answer is “yes” – I think that it is important and appropriate that I express on behalf of the Division our deep concern about the apparent basis of this decision and the serious potential divergence it represents.

As you know, since 1996 the Antitrust Division has devoted substantial effort to a Section 2 case aimed at addressing exclusionary conduct by Microsoft. The ultimate outcome reflected not only considerable analysis and enforcement judgments by the Department and many state attorneys general, but also thorough review of those judgments in the U.S. judicial system. The Final Judgment that emerged from that process provides clear and effective protection for competition and consumers by preventing affirmative misconduct by Microsoft that would inhibit competition in middleware programs. That protection applies not only to the web browser that was the original subject of the United States’ lawsuit, but also to the media player that is one of the subjects of the EC’s decision. Given this significant prior U.S. effort, it is unfortunate that considerations of international comity and deference did not, in the Commission’s judgment, carry sufficient weight to avoid the significant divergence that has now occurred. In a system of multiple enforcers, the alternative inevitably leads parties who can benefit from regulatory assistance to seek out the most restrictive regulator, and with respect to global products the effects of that regulator’s actions may have effects in all markets.

In our judgment, the important tasks of eliminating affirmative impediments to the healthy functioning of competitive markets should be achieved without unduly hindering successful competitors or imposing burdens on third parties. This fine balance is reflected in the carefully crafted terms of the Final Judgment entered by the District Court. The EC has pursued a different enforcement approach by imposing a ‘code removal’ remedy that was not at any time – including during the period when the U.S. was seeking a breakup of Microsoft prior to the rejection of that remedy by the court of appeals – part of the United States’ proposed remedy. We are concerned that imposing antitrust liability on the basis of product enhancements, even by “dominant” companies, risks protecting competitors, not competition, in ways that may ultimately harm innovation and the consumers who benefit from it.

In the case of simply adding admittedly valuable and functional features to an existing product – as opposed to the contractual terms and exclusionary manipulations of software that were the issue in the U.S. case and that are now prevented by our remedy – my concern is that decisions of this type may be interpreted by firms in ways that chill lawful product improvements that benefit consumers. If the result is that a dominant firm simply cannot improve its product by the addition of features until that product becomes sufficiently inferior that its dominance is eroded, then the inconsistency with core principles of U.S. antitrust law is plain. Even if a workable standard could be advanced, the potential for anticompetitive and anticonsumer consequences would remain high, both in a U.S. system in which enforcement is amplified through private treble damages litigation, and in an EC system where the threshold for finding “dominance” appears much lower. Again, our concern is that while certain competitors may well benefit from intervention, consumers and innovation ultimately may not.

As I have said before, it is important to emphasize the overall strong and positive relationship between the U.S. and the EC on matters of competition policy. This includes strong personal relationships and mutual respect throughout the staff and leadership levels of the two agencies. Today is not the time to discuss the details of the Commission's decision, which is not yet publicly available. Going forward, we expect to work closely with the Commission under the terms of our 1991 Cooperation Agreement to avoid any unnecessary conflict between the Commission's Order and our Final Judgment. I expect the success of our working relationship to continue, and our ability to engage in a frank and constructive dialog reflects the health of that relationship.

I thank you for the opportunity to review with you some of the aspects of antitrust enforcement that are important to the Division, and I look forward to participating in this morning's Roundtable.